King Soopers, Inc. *and* United Food and Commercial Workers Union, Local No. 7. Cases 27–CA–16902–1, 27–CA–16914–1, and 27–CA–16914–2

June 17, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 22, 2001, Administrative Law Judge James L. Rose issued the attached decision. The Respondent and the General Counsel each filed exceptions, supporting briefs, answering briefs, and reply briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order, and to adopt the judge's recommended Order as modified below.[3]

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The General Counsel filed a motion to strike the affidavit of the Respondent's counsel, Emily F. Keimig, certain attachments to that affidavit, and any references thereto from the Respondent's reply brief. The Respondent filed an opposition to the motion to strike. We agree with the General Counsel that the affidavit and exhibits attached thereto, with the exception of the Respondent's June 8, 1999 memorandum concerning union information requests, were not introduced as evidence at the hearing and, therefore, cannot be introduced into the record at this point. See Sec. 102.45(b) of the Board's Rules and Regulations. Accordingly, we grant the General Counsel's motion to strike the affidavit, the attached exhibits and references thereto from the Respondent's reply brief, with the exception of the Respondent's memorandum on information requests. *S. Freedman Electric, Inc.*, 256 NLRB 432 fn. 2 (1981).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

[3] We shall modify the judge's recommended Order to conform to the requirements of *Indian Hills Care Center,* 321 NLRB 144 (1996), as revised in *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall also substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

We find that the Respondent has not demonstrated a proclivity to violate the Act and we accordingly agree with the judge that a broad cease-and-desist order is not warranted. We note that the Respondent's unfair labor practices found here and in *King Soopers, Inc.*, 344 NLRB No. 103 (2005), also decided today, involve refusals to provide requested information. However, in each instance, the Respondent had an arguably meritorious reason for refusing to provide the requested information. Furthermore, the Respondent has contracts with at least five unions representing thousands of employees at over 60 stores in Colorado, processes at least 900 grievances annually, and, as the judge noted, complies with virtually all of the many information requests made with regard to these grievances. Our colleague, in arguing for a broad order, notes that the Board has found the Respondent guilty of unfair labor practices in other cases. However, the instant case involves a refusal to provide information; only one other case involves this kind of violation. In these circumstances, and given the aforementioned overall record in a large enterprise, we are not persuaded that the General Counsel has met the evidentiary burden for a broad Board order. See *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941); *Consolidated Coal Co.*, 307 NLRB 976 fn. 2, 978 (1992); *Postal Service*, 314 NLRB 227 (1994).

Member Liebman, unlike her colleagues, would grant a broad cease-and-desist order under *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979) (finding that a broad order is warranted "when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights"). Based on the violations found in this proceeding, and the violations found in other proceedings before the Board, she would find that the Respondent has demonstrated a proclivity to violate the Act. See, e.g., *King Soopers, Inc.,*supra, 344 NLRB No. 103 (2005), also decided this day (refusal to provide, and delay in providing information)*; King Soopers, Inc.*, 340 NLRB 628 (2003) (failure to bargain before implementing the use of new technology by represented employees); *King Soopers, Inc.*, 334 NLRB No. 38 (2001) (not reported in bound volumes) (refusal to bargain with the union); *King Soopers, Inc.*, 332 NLRB 23 (2000), affd. 275 F.3d 978 (10th Cir. 2001) (threatening the job tenure of an employee because of his union activities, discriminatorily refusing to permit the posting of union information on a bulletin board, and refusing to furnish requested information to the union); *King Soopers, Inc.*, 332 NLRB 32 (2000), enfd. 254 F.3d 738 (8th Cir. 2001) (withdrawing recognition from, and refusing to apply the collective-bargaining agreements with, two unions and associated 8(a)(5) violations).

Member Schaumber notes that the Board's decision in *Hickmott,* supra, 242 NLRB at 1357, was in response—albeit a long-delayed response—to the Supreme Court's decision in *Express Publishing,* supra, 312 U.S. at 426. In the latter case, the Supreme Court admonished the Board for issuing an order restraining "any" violation of the Act; the Board's "broad order." The Court found the issuance of such an extraordinary order inconsistent with the express language of the statute [Section 10(c) permits the Board to order a party who has been found to have committed an unfair labor practice "to cease and desist from *such* unfair labor practice" (emphasis added)], the structure of the statute with its separate and carefully defined unfair labor practices, and the due process standards governing the issuance of an injunction by a court. See, e.g., Fed.R.Civ.P. 65(d). At the conclusion of its decision, the court said: "[T]o justify an order restraining *other violations* it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of conduct in the past." 312 U.S. at 437 (emphasis added). Extant Board law relies on this language as warrant for the Board to issue orders restraining **"***any violations*." Without commenting on the reasonableness of this construction, in Member Schaumber's view, at a minimum, the Board's *Hickmott* standard must be interpreted and applied consistent with the Court's decision in *Express Publishing*. He agrees for the reasons stated by the majority, the *Hickmott* standard has not been met here. Member Schaumber expresses the further view that *Hickmott's* somewhat ambiguous standard meets the specificity requirements for injunctive relief expressed by the Supreme Court in *Express Publishing* only in cases where the violations are severe, numerous and cut across the various categories of unfair labor practices defined by Congress in the Act. In other words, the inherent vagueness of an order restraining "any violations" of the Act may be clarified by the breadth of a respondent's misconduct. Absent the foregoing, he believes, a narrow order enjoining the viola-

I. INTRODUCTION

This case arises from several information requests by the Union concerning (1) a grievance filed by the Respondent against the Union and (2) the Respondent's reopening of store #53.[4] For the reasons described by the judge, we find that the Respondent violated Section 8(a)(5) by refusing to furnish financial information requested that was relevant to the Union's defense against the grievance. We also find, however, that the Respondent unlawfully refused the Union's request for a copy of the letter of understanding upon which the Respondent in part based its grievance (the Behlke-Mercer agreement), and other nonfinancial information concerning the Respondent's grievance.

As for the request for information concerning the reopening of store #53, we agree with the judge's finding, for the reasons he states, that the Respondent violated Section 8(a)(5) by refusing to furnish certain items. We also find, however, that the Respondent unlawfully failed to provide the requested timecards of employees from other stores who worked at store #53 during the week of that store's reopening.

II. INFORMATION REQUESTS RELATED TO THE RESPONDENT'S GRIEVANCE

A. Facts

On March 14, 2000,[5] Ray Deeny, the Respondent's counsel, notified Local No. 7 President Ernest Duran, by letter, that the Respondent was filing a grievance against the Union, alleging that the Union had breached a confidentiality agreement between the parties by publishing confidential sales data in its "Voice of 7" monthly newsletter. In response, Duran requested the following information from the Respondent to evaluate the grievance: any documents that the Respondent relied on in asserting the grievance; any documents that supported the Respondent's assertions, allegations, and grievance; any information relating to the notice the Union was given concerning the confidential nature of the Respondent's sales data; the Respondent's sales and profit figures by store, throughout Colorado, from January 25 to date; and documents reflecting the Respondent's claim of lost revenue and costs.

At a meeting held on April 6, the Respondent's labor relations manager, Stephanie Bouknight, informed Union Representative Kim Cordova that the Union had violated the collective-bargaining agreement as well as a letter of understanding by publishing the Respondent's sales data in the "Voice of 7" newsletter. Bouknight explained that the letter of understanding was signed by Ed Behlke, a former labor relations manager for the Respondent, and Charlie Mercer, a former Local No. 7 president. She did not disclose when the letter of understanding was signed and executed.[6] She then informed Cordova that the Respondent would not provide the financial information demanded by the Union until the parties had executed and signed a confidentiality agreement.[7] The Union agreed to keep the information confidential. The Respondent wanted a signed agreement with sanctions, but it never proffered such an agreement. The next day, Cordova sent Bouknight a letter renewing Duran's information request and also demanding a copy of the Behlke-Mercer agreement.

Because the Respondent had still not provided the Union with any of the requested information by late April, Cordova refused to hold a step 2 meeting on the Respondent's grievance with Ted Tow, the Respondent's counsel. Nor had the Respondent provided the Union with any of the requested information, financial or otherwise, before the hearing in this proceeding in February 2001.

We agree with the judge that the Respondent violated Section 8(a)(5) in regard to the financial information. In part B below, we reverse the judge and find that the Respondent violated Section 8(a)(5) by not providing a copy of the agreement. In part C below, we find that the Respondent violated Section 8(a)(5) by failing to provide nonfinancial information.

B. The Behlke-Mercer Agreement

The judge found that the Respondent did not violate the Act by failing and refusing to furnish the Union with

tions found and "any like and related" misconduct serves as an adequate restraint, and is both consistent with the Act and *Express Publishing*.

Chairman Battista believes that the test of *Hickmott*, supra, 242 NLRB at 1357, properly applied, is consistent with the Supreme Court's decision in *Express Publishing*, supra, 312 U.S. at 436, and with Sec. 10(c). In his opinion, the Board has the power to issue broad orders but that power should be exercised sparingly, and then only in the most egregious cases. He does not believe, for the reasons cited earlier, that this is such a case.

[4] There was also a request for information concerning the Respondent's closing of store #23. Because there were no exceptions to the judge's dismissal of the complaint allegations concerning store #23, we find it unnecessary to pass on the Respondent's exceptions to certain findings by the judge in connection with this allegation, which will not be further discussed in this decision.

[5] All dates are in 2000, unless otherwise indicated.

[6] Bouknight testified that she told Cordova at this meeting that the Behlke-Mercer agreement had been provided to the Union in a recent, unrelated Federal lawsuit involving retiree picketing. Cordova's testimony disputed this assertion, and claimed that the reference to the federal litigation occurred during another grievance relating to retiree picketing, and did not include any reference to the Behlke-Mercer agreement. The judge did not resolve this conflict, which he termed an immaterial factual dispute.

[7] According to Bouknight, the Respondent did not rely solely on the Behlke-Mercer agreement in asserting its grievance against the Union.

a copy of the Behlke-Mercer agreement. In dismissing this allegation, the judge reasoned that, "it stretches credulity" that the Union did not have a copy of this "important" document in its files, which it helped to create and to which it was a party.[8]

It is well established that "absent special circumstances, a union's right to information is not defeated merely because the union may acquire the needed information through an independent course of action." *Kroger Co.*, 226 NLRB 512, 513 (1976). See also *B. P. Exploration (Alaska), Inc.*, 337 NLRB 887, 889 (2002); *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995).

Applying that standard here, we find that the Respondent's duty to provide the Union with a copy of the Behlke-Mercer agreement was not satisfied merely because the Union might have been able to locate the document in its records. The evidence reveals that the Behlke-Mercer agreement was signed in 1986, 14 years before the events in this proceeding. Further, it was not incorporated into the parties' most recent collective-bargaining agreement, as were several other letters of understanding dating back to 1980. Under the terms of the collective-bargaining agreement, any letter of understanding not incorporated was deemed null and void. In view of this express contractual provision and the Respondent's failure even to inform the Union of the date of the letter, we find that there is no basis on which to conclude that the Union had ready access to this letter, even assuming that this document was located somewhere in its records.[9] In these circumstances, and because the Behlke-Mercer letter of understanding was readily available to the Respondent, we conclude that the Respondent was obligated under Section 8(a)(5) to provide it to the Union pursuant to its request.[10]

C. Other Nonfinancial Information

Likewise, we also find that the Respondent violated Section 8(a)(5) by not furnishing the Union with the other requested nonfinancial information (i.e., documents upon which the Respondent relied in asserting its grievance, documents that supported the Respondent's claims, and information related to notice provided to the Union of the confidential nature of the published information), the relevance of which is not disputed. Further, there is no contention that this demand was overly burdensome, or that the information was not available. Bouknight admitted during the hearing that the Respondent had relied not only on the Behlke-Mercer agreement but also other information in asserting its grievance against the Union.[11] Thus, the Union was entitled to this other nonfinancial information pursuant to its request, so that it could properly evaluate the merits of the Respondent's grievance.[12]

III. INFORMATION REQUESTS RELATED TO STORE #53 GREIVANCE

In May 1999, the Respondent reopened its store #53 in Colorado Springs. On May 28, 1999, Business Agent Keith Hardin filed a grievance, alleging that the Respondent had failed to apply article 10 of the collective-bargaining agreement in scheduling employees to work at store #53 during the week it reopened. In the grievance, Hardin alleged that the Respondent had failed to comply with the required article 10 "Select-A-Shift" work scheduling procedures[13] by instead using employees from other stores to work approximately 60 hours that were not included on the "Select-A-Shift" list for the week of the reopening.

On June 2, 1999, Hardin requested the following information from store #53 Manager Reggie Winston in connection with the grievance: the date of the posting of the select-a-shift for the week of the reopening; the date that management commenced contacting other stores for additional employees; the shifts available for employees of other stores; copies of the timecards for employees from other stores who worked at store #53; and a copy of the original select-a-shift schedule from which employees selected their shifts. During a step 2 meeting held on August 10, 1999, Hardin informed Bouknight that he had not received any of the information he had requested from Winston. During the next 9 months, the Union

[8] Cordova testified that she had been unable to locate the agreement referred to by Bouknight.

[9] As to the Respondent's contention that it had provided the Union with that document in connection with the unrelated Federal litigation, this assertion is contradicted by Cordova's testimony.

[10] See *Illinois-American Water Co.*, 296 NLRB 715, 724 (1989), enfd. 933 F.2d 1368 (7th Cir. 1991) (even though requested information is available to a labor organization through other sources, including its own records, an employer is not relieved of its bargaining obligation to supply the requested information to the labor organization in a convenient form).

[11] Bouknight did not identify the other documents upon which the Respondent relied in asserting its grievance.

[12] In rejecting the Respondent's contention that it had no such nonfinancial information to provide in response to the Union's request, we note that Respondent Labor Relations Manager Bouknight testified that the Respondent did not provide any of the requested information. She did not testify that the Respondent had no such information to provide.

[13] Under this procedure, 10 days before the start of a workweek, management will post a list of the available shifts for each department. Employees then select their preferred shifts from the posted list, in seniority order. Once the employees have selected their shifts, management prepares a master work schedule and posts it on the Friday morning preceding the start of the next work week. Employees who are interested in working additional hours are permitted to sign up on the additional hours list posted by management.

renewed its information request covering the timecards on at least four other occasions.

The judge found that, with the exception of the Respondent's refusal to provide the timecards, the Respondent's refusal to provide the requested information violated Section 8(a)(5). We agree with this finding of a 8(a)(5) violation. However, we disagree with the judge's finding that the Respondent's refusal to provide the timecards did not violate Section 8(a)(5).

In finding that the Respondent did not violate the Act by refusing to furnish copies of the timecards, the judge observed that "Hardin made no effort to secure those cards from other stores" and that "Hardin did not take all reasonable and necessary steps to secure the time cards he wanted." The judge, however, ignored the well-established Board precedent discussed above that a union's ability to obtain requested information elsewhere does not excuse an employer's obligation to provide the requested information. See, e.g., *B. P. Exploration (Alaska), Inc.*, supra, 337 NLRB at 889; *Detroit Newspaper Agency*, supra, 317 NLRB at 1072; *Kroger Co.*, supra, 226 NLRB at 513.

Here, the Respondent did not dispute the presumption that the timecards are relevant. Nor did it claim that assembling the timecards would be burdensome. Instead, the Respondent claims that Hardin, in requesting the timecards from Store Manager Winston rather than from Labor Relations, did not follow the proper protocol for obtaining the timecards. Because the Respondent's protocol was disseminated to store managers by a memorandum dated June 8, 1999,[14] approximately 1 week after Hardin's information request to Winston, we find it is irrelevant to the Respondent's statutory duty to provide the requested information.[15] In any event, we find that by contacting Bouknight directly on August 2, 1999, and thereby renewing the Union's earlier request for information, including the timecards, Hardin had, in fact, complied with the Respondent's protocol. According to Bouknight, she subsequently contacted store #53 Manager Winston to ask if he knew which employees from other stores had worked at store #53 the week of the reopening and he replied he did not. She admitted that no further effort was made to furnish the timecards Hardin had requested. In these circumstances, we find that the Respondent did not provide access to the requested timecards and thereby violated Section 8(a)(5).

[14] The protocol states that store managers are responsible for facilitating access to "certain Company information" requested by a union and that "broad requests" such as "time cards that relate to more than one employee . . . should be directed to Labor Relations."

[15] This memorandum does not reflect that the Union was involved in the formulation of the protocol.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, King Soopers, Inc., Denver, Colorado, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified below.[16]

1. Substitute the following for paragraph 2(a) of the recommended Order.

"(a) Furnish the Union with the information, financial and otherwise, requested in connection with the Respondent's grievance against the Union and if the Respondent requires a written confidentiality agreement, it should draft and bargain in good faith concerning its contents. Furnish the information requested concerning the reopening of store #53, including, but not limited to, copies of the timecards for all employees from other stores who temporarily worked at store #53 during the week ending May 22, 1999."

2. Substitute the following for paragraph 2(b) of the recommended Order.

"(b) Within 14 days after service by the Region, post at store #53 copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at such closed facility at any time since August 10, 1999."

3. Substitute the attached notice for that of the administrative law judge.

[16] To the extent that the Respondent has already furnished any of the requested information, that information need not be refurnished.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with the United Food and Commercial Workers Union, Local No. 7 (Union) as the duly designated representative of our employees by refusing to furnish necessary and relevant information concerning bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL furnish the Union with information, financial and otherwise, requested in connection with our grievance against the Union and the information requested concerning the reopening of store #53, including, but not limited to, copies of timecards for all employees from other stores who temporarily worked at store #53 during the week ending May 22, 1999.

KING SOOPERS, INC.

Daniel J. Michalski, Esq., for the General Counsel.
Emily F. Keimig and *Patrick J. Miller, Esqs.,* of Denver, Colorado, for the Respondent.
Michael J. Belo, Esq., of Wheat Ridge, Colorado, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Denver, Colorado, on February 20 and 21, 2001, upon the General Counsel's complaint which alleged that the Respondent refused to furnish the Charging Party certain information in violation of Section 8(a)(5) of the National Labor Relations Act (the Act).

The Respondent generally denied that it committed any violations of the Act and affirmatively contends, as to certain allegedly confidential material, that the Union refused to sign a confidentiality agreement; that as to other information, the charge was filed before the Respondent reasonably could furnish the information and in any event, it did furnish the information and that which the Charging Party did not receive was the result of the Charging Party not following established protocol. Finally, it is alleged that a portion of the complaint should be dismissed as being barred by Section 10(b) of the Act.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following findings of fact, conclusions of law, and recommended order.

I. JURISDICTION

The Respondent is a corporation engaged in the operation of retail grocery stores with facilities, among other places, in Denver and Colorado Springs, Colorado. During the course and conduct of this business the Respondent annually purchases and receives directly from points outside the State of Colorado, goods, products, and materials valued in excess of $50,000 and annually derives gross revenues in excess of $500,000. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, Untied Food and Commercial Workers Union, Local No. 7 (the Union), is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

For many years the Union has been the bargaining representative for various units of the Respondent's employees in its retail stores, including those in Denver and Colorado Springs. The Union and Respondent have been parties to successive collective-bargaining agreements, the most recent of which is effective from July 11, 1999, through September 11, 2004. During the course of this relationship, the parties have had disputes concerning the Respondent's duty to furnish information requested by the Union. In praying for a broad, companywide order, the General Counsel offered evidence that two of these disputes have resulted in decisions by the Board.[1]

This case involves three distinct requests for information by the Union. The first concerns a request for financial information in connection with a grievance filed against the Union by the Respondent, which involves the allegation that the Union breached an earlier agreement between the parties that the Union would not disclose financial information received from the Respondent. The second involves information relating to the closing of store #23 in Colorado Springs; and the third, the reopening of store #53 in Colorado Springs. The facts of each request will be set forth in more detail below.

[1] 332 NLRB 23 (2000).

B. Analysis and Concluding Findings

1. The Respondent's grievance

Sometime in early 2000,[2] the Union published in its newsletter, *Voice of 7,* certain sales information it had received from the Respondent. Believing this was a violation of a confidentiality agreement entered into by the parties some years previously, and therefore a breach of the collective-bargaining agreement, the Respondent filed a grievance. During the course of processing this grievance, the Union's assigned agent as well as its president sought, among other things, "Sales and profit figures by store, throughout Colorado from January 25, 2000, to date." "All documents that reflect the 'lost revenue and costs' the Company is claiming."

In discussions between Kim Cordova, the Union's agent, and Stephanie Bouknight, the Respondent's manager of labor relations, the Respondent took the position that it would not furnish the requested financial information absent the Union's agreement to keep the information confidential. And by letter of April 13, an attorney for the Respondent wrote Union President Ernest Duran: "We renew our request that Ms. Cordova agree to keep the data confidential, which is to be used only for this grievance and arbitration."

Duran responded by letter of April 17, ". . . be advised the financial information will be kept confidential and used only for the purposes of this case." Nevertheless, the Respondent has refused to furnish the information because, according to Bouknight, "It—the information wasn't going to get released until we had a document that was signed by both parties and dealt with what would happen if this information was released."

Inasmuch as Duran agreed in his letter of April 17 that the requested financial information would be kept confidential, the Respondent's position is that the Union has refused to sign some kind of an enforceable document to that effect. However, the Respondent has never drafted and presented to the Union such a document.

Unquestionably, the Union has the right to have this information in order to defend the Respondent's grievance. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967); however, the Respondent certainly has the right to have its financial information treated as confidential. Thus, "(t)he Board balances the union's need for the requested information against any 'legitimate and substantial confidentiality interests' of the employer." *Postal Service,* 332 NLRB 635, 638 (2000), and cases cited therein. Further, the Board requires that this balancing, in the first instance, be accomplished through bargaining. "A party claiming confidentiality must tell the union of its claim and bargain to seek accommodation of its interests." Ibid.

A reasonable accommodation would be the Union's agreement that the requested information be kept confidential. To this the Union agreed. The Respondent then suggested that it would need a signed document containing enforceable sanctions, but it never presented to the Union what it had in mind. The Union did not reject signing a confidentiality document because none was ever proffered. In short, the bargaining process stopped with the Respondent simply stating that it wanted something in writing. This, I conclude, was not sufficient to satisfy the Respondent's duty and place the burden of further action on the Union.

I reject the Respondent's argument that the burden was on the Union to draft a proposed agreement with enforceable sanctions. Since the Respondent sought the agreement, and presumably knew what would satisfy its needs, I conclude it had the burden of initiating the drafting process. To require the Union to make the first draft would boarder on futility since the Union could not know exactly what would be acceptable to the Respondent. As the Board noted in *Postal Service,* supra, the party claiming confidentiality of its records is required to take the initiative in negotiating an acceptable accommodation. A general statement, such as that made by Bouknight to Cordova that the Respondent required a written agreement does not satisfy this burden.

Nor is the Respondent excused from initiating a draft simply because such would involve legal expenses, as claimed by Stephen DiCroce, the Respondent's director of HR/labor relations. If the Respondent would incur legal expenses by having to write the first draft, so would the Union. To put a burden on the Union for something the Respondent demanded would not be fair or reasonable.

Accordingly, I conclude that the Respondent violated Section 8(a)(5) in refusing the Union's demand for financial information. If the Respondent wants to preserve the confidentiality of this information, then it must take steps to negotiate an accommodation with the Union, including making the initial draft of any agreement it believes necessary. I am mindful, as the Board noted in *Minnesota Mining & Mfg. Co.,* 261 NLRB 27 (1982), that such an order might bring the parties back before the Board. Nevertheless, requiring the parties to bargain is the preferred option under the Act.

Apparently the Union also asked for the agreement which the Respondent contends the Union breached. This was a 1986 letter of understanding between the Union's then president and a labor relations employee of the Respondent, generated on the Union's letterhead, and referred to in the record as the Behlke/Mercer agreement. There is an immaterial factual dispute as to whether this was provided to the Union in connection with a case in Federal District Court on unrelated litigation. The Behlke/Mercer agreement is in the record here and in any event, it stretches credulity that the Union did not in fact have a copy of this important document, which it apparently created and to which it is a party, in its files. I conclude that the Respondent did not violate the Act in refusing to furnish a copy of the Behlke/Mercer agreement.

2. The store #23 closing

By letter dated February 7, DiCroce, the Respondent's director of HR/labor relations advised the Union that store #23 would be closed on April 8. The Union's business agent typically handling the affairs of employees of store #23 was Cindy Lucero. Although Lucero did not testify in this proceeding, from a Respondent exhibit I find that on April 5 she held a step 1 grievance meeting with the manager of store #23 concerning a "class action—all King Soopers" grievance. During this meeting she asked for and was given "a copy of Store #23 em-

[2] All dates are in 2000, unless otherwise indicated.

ployee hire dates and to what store they were transferred to." There is no testimony concerning what was discussed at this meeting and what other information may have been requested and given; however, the grievance was not resolved and on April 11 Lucero requested a step 2 meeting.

Keith Hardin is another union business agent servicing the Colorado Springs stores. He testified that he and Lucero split the stores and employees serviced, but he was the more experienced business agent. He therefore undertook to become involved in the store #23 closing. However, he also testified that he "did not have much contact" with Lucero concerning this, was not aware she had filed a grievance or had had a step 1 meeting on April 5, and does not know what information she requested or received.

On March 31, a few days before Lucero's scheduled step 1 meeting with the store manager, Hardin wrote Bouknight requesting the answers to several questions concerning the store #23 closing. He was specifically interested in learning whether the employees were to be transferred or would be given layoff options. He reiterated this request on April 3, and then on April 20 again wrote Bouknight with additional questions. She did not answer and he repeated the request on May 1. Then on May 4, Hardin wrote DiCroce asking for his help in securing answers to his requests. Hardin also filed three step 2 requests on April 17, though there is no evidence of step 1 meetings regarding these grievances. On May 22, the Union requested arbitration of these grievances.

At their meeting on May 25, Bouknight gave Hardin a packet which she suggested was responsive to his requests. Specifically, it is a several page document naming each bargaining unit employee of store #23, the store to which that individual was transferred, or, in a few cases, noting the employee was laid off. By letter of July 20, Hardin informed Bouknight that in his opinion, the material she furnished was inadequate.

The General Counsel agrees that the information given on May 25 (if not before) satisfied Hardin's March 31 request; however, the General Counsel argues that such did not answer the questions posed by Hardin on April 20 "whether the Company gave store 23 employees layoff options in connection with the closure of store 23, whether the Company placed store 23 employees into other stores under the contract's transfer language, what factors the Company considered in deciding how to place store 23 employees in connection with the closure of store 23 and what procedures the Company used in moving managers covered by the collective-bargaining agreement in connection with the closure of store 23." (GC Br. 21.)

Citing *WXON-TV, Inc.,* 289 NLRB 615 (1988), the Respondent argues that the Union filed its charge before making the request and therefore it should be excused from failing to furnish the information. I disagree because I conclude that *WXON-TV* is inapposite. There the information request was indeed made only one day before the charge was filed and at a time when the company could not have known of the request. However, the charge also alleged violations of Section 8(a)(3) and (5), and the Board concluded that the information request was not for purposes of collective bargaining but was a discovery device for its other allegations of unfair labor practices.

There is at a minimum an aspect here of the right hand not knowing what the left is doing, and this concerns with whom the Respondent must deal and whether it has reasonably fulfilled its obligations under the Act. Lucero was primarily responsible for servicing store #23. She began handling the grievance, and apparently continued to do so. Hardin then became involved and made a request for information a few days before Lucero met with the store manager at step 1. And he subsequently requested information which Lucero had already been given. Thus when the charge was filed on May 11, the evidence suggests that the Union had all the information it had requested at that time concerning the store #23 grievance.

Notwithstanding that Lucero was in charge of this grievance, and would be the one to have firsthand knowledge of what she requested and was given on April 5, she was not called as a witness for the General Counsel. Nor does counsel for the General Counsel even mention her in his brief. In fact, her name and position is first mentioned in the record on cross-examination. I find these omissions to seriously affect the credibility of the General Counsel's case. *International Automated Machines,* 285 NLRB 1122 (1987).

The Respondent argues that all the information requested and relevant to the store #23 grievance was furnished by Bouknight in her meeting with Hardin on May 25. Given the facts outlined above, I find it difficult to accept Hardin's mere opinion that Bouknight was less than forthcoming. I conclude that in fact the Respondent did furnish all the information necessary and relevant to the store #23 grievance in a timely fashion. Accordingly, I will recommend that the allegations relating to the store #23 grievance be dismissed.

3. Reopening of store #53

In May 1999, the Respondent reopened store #53 in Colorado Springs after some kind of remodeling. During the week ending May 22, 1999, apparently, more than the normal employee/hours were required. Thus employees from other Colorado Springs stores were asked to work some of these hours and this resulted in a grievance filed by Hardin contending that those hours should have been made available to store #53 employees.

The Union's complaint, as stated on the step 2 form, was: "Management didn't post shifts correctly for employees to select. After the schedule was posted and selected management added over sixty hours and used people from other store[s]. Current KS #53 worked later shifts and some part time employees weren't allowed to select eight hour shifts." A step 1 meeting was held between Store Manager Reggie Winston and Hardin on May 25, 1999. The step 2 meeting was held on August 10, 1999, between Bouknight and Hardin. As the matter was not resolved, Duran demanded arbitration by letter dated September 7, 1999.

At issue here is Hardin's June 2, 1999 request for information:

> 1. Date select-a-shift was posted for selection for week ending May 22, 1999.
>
> 2. Date management started calling other stores for employees.
>
> 3. All shifts available for employees at other stores.

4. Copy of time card for every employee who worked at your store from another store.

5. Copy of original select-a-shift schedule that employees selected from.

Hardin did not receive this information, and thus he made subsequent requests on August 8 and September 13, 1999. On one of these, he added: "6. Need copy of additional hours list for week ending 5–22–99."

Hardin testified that during his meeting with Bouknight on August 10, he told her he had not received the information he requested. She called Winston then told Hardin that he did not have the "additional hours request." Hardin testified that he told her this was not an additional hours issue (notwithstanding addendum "6"). That is the extent of his testimony about this meeting.

Hardin then made periodic followup requests and finally, at a meeting with Bouknight on May 25, 2000, she gave him certain documents, but, according to Hardin, she did not provide everything he requested. Included in the packet was the original select-a-shift schedule but not the additional hours list for the week ending May 22, 1999; the date the select-a-shift schedule was posted; the date management began calling other stores for employees; the shifts available for employees from other stores; or timecards of employees from other stores.

The Respondent seems to argue that somehow the Union was not entitled to all the requested information because Hardin filed a charge 2 weeks before the May 25 meeting, and that his request to her preceding that meeting was the first she knew about the problem, that "[u]ntil this time, the request remained at the store level, as there had been no official request to Bouknight under the protocol." (R. Br.) I reject this contention. Hardin and Bouknight had a step 2 meeting in August 1999, during which this very issue was discussed. Perhaps Hardin could have been more aggressive in pursuing his request, but such does not excuse the Respondent from furnishing information clearly relevant to a grievance.

The Respondent also contends that under a "protocol" issued by DiCroce to all store managers dated June 8, 1999, Winston was not "required to do the research and/or make copies" of timecards, schedules, and the like. The Respondent argues that Winston did not have the timecards of nonstore #53 employees and at the August meeting Hardin was so informed. Hardin made no effort to secure those cards from other stores. I agree that Hardin did not take all reasonable and necessary steps to secure the timecards he wanted.

However, as to the other matters requested, I conclude that the information must have been available to Winston and he simply did not supply it. Nor did Bouknight. Therefore, I conclude that the Respondent breached its duty under Section 8(a)(5) in this respect.[3]

[3] The Respondent also argues that Sec. 10(b) bars an order on this issue since the charge was filed more than 6 months after Hardin's initial request. Sec. 10(b) is an affirmative defense which must be timely plead. Since the Respondent's answer does not raise the Sec. 10(b) defense, it will not be considered.

REMEDY

Having concluded that the Respondent has violated the Act in certain respects, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel has requested a broad, companywide remedy to include a notice posting at all the Respondent's stores. This is based on the General Counsel's assertion that the Respondent has a history of repeated violations of its duty to furnish information and that Bouknight was involved in them all. Although decisions in two previous cases were made a part of the record here, and a similar case was heard by me involving another bargaining unit[4] the evidence does not support the kind of proclivity to violate the Act which the General Counsel contends. For instance, Harlin testified that as a business agent in Colorado Springs, he is responsible for approximately 750 employees in about half of the Respondent's eight stores. He handles about 50 grievances a year and makes an information request in half of those. Only in this case, of the many requests made by Harlin, has the Respondent failed to fully comply. And Harlin is just one of many business agents for the Union. I conclude that as a matter of policy and practice, the Respondent does in fact abide by its obligations under the Act to furnish relevant information.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, King Soopers, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the duly designated representative of its employees in appropriate bargaining units by refusing to furnish the Union on request necessary and relevant information concerning bargaining unit employees.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union the financial information requested in connection with the Respondent's grievance against the Union and if the Respondent requires a written confidentiality agreement, it should draft such and bargain in good faith concerning its contents. Furnish the information requested concerning the reopening of store #53.

(b) Within 14 days after service by the Region, post at store #53 copies of the attached notice marked "Appendix."[6] Copies

[4] Cases 27–CA–16934–1 and 27–CA–17102–1.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all former employees employed by the Respondent at any closed facility since the date of this Order.

(c) Within 21 days after service of this Order, inform the Region, in writing, what steps the Respondent has taken to comply therewith.

(d) The allegations not found to be unfair labor practices are dismissed.

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ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."